

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**IN RE: DIGITEK PRODUCT LIABILITY
LITIGATION**

MDL NO. 1968

THIS DOCUMENT RELATES TO ALL CASES


**MOTION TO DISMISS COUNT FIVE OF THE
MASTER CONSOLIDATED COMPLAINT FOR INDIVIDUALS**

Defendants Actavis Totowa LLC, Actavis Inc., Actavis Elizabeth LLC, Mylan Inc., Mylan Pharmaceuticals Inc., Mylan Bertek Pharmaceuticals Inc., and UDL Laboratories, Inc. (“Defendants”), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully request that this Court dismiss Count Five: Negligence *Per Se*, of the Master Consolidated Complaint for Individuals. Count Five fails to state a claim upon which relief can be granted because it alleges a private cause of action for violations of the Federal Food, Drug and Cosmetics Act (“FDCA”), 21 U.S.C. § 301, *et seq.*, when the Act expressly limits its enforcement to the federal government. *See* 21 U.S.C. § 337(a). With no right to privately enforce the FDCA, Plaintiffs cannot allege a viable cause of action for negligence *per se* based upon violations of the Act and thus, Count Five should be dismissed.

The grounds for this Motion are more fully set forth in the attached Memorandum in Support, which is incorporated herein.

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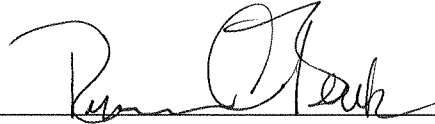
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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2009, I electronically filed the foregoing "Motion to Dismiss Count Five of the Master Consolidated Complaint for Individuals" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

A handwritten signature in black ink, appearing to read "Rebecca A. Betts", is written over a horizontal line.

REBECCA A. BETTS (WVSB # 329)

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